IN THE MATTER OF:

THE LAW SOCIETY'S PRACTICE NOTE
ON SHARIA SUCCESSION RULES

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ADVICE

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Introduction

1. I am asked to advise Southall Black Sisters ('SBS') on the legal implications of a Practice Note promulgated by the Law Society addressing Sharia succession rules and the preparation of wills ('the Practice Note').

2. In short summary, I advise that there are good prospects of succeeding in a claim in judicial review against the Law Society (i) that the Practice Note was issued in violation of the Public Sector Equality Duty ('PSED') under section 149, Equality Act 2010, and (ii) that in failing to withdraw the Practice Note, the Law Society is in continuing breach of the PSED under section 149, Equality Act 2010.

3. Further, proceedings may be brought in judicial review against the Law Society on the basis that (i) whilst the Guidance is capable of being implemented lawfully, it gives rise to an unacceptable risk of unlawful acts or decisions (namely, under section 29, Equality Act 2010 by solicitors in advising on and preparing wills), and accordingly is unlawful and (ii) the issuing of the Practice Note violates Articles 8 and 14 of the Human Rights Act 1998.

4. There is also is a real and significant risk posed by the guidance that, if followed, solicitors will find themselves acting in violation of section 29 of the Equality Act 2010. This is something about which they should be warned.

5. Arguably too, the Law Society in issuing the Practice Note and maintaining it is (i) in breach of the positive obligations implicit in Articles 8 and 14, Sch 1, Human Rights Act 1998 ('HRA') and is therefore acting unlawfully (section 6, HRA) and (ii) erred in concluding that though "express consideration was given as to whether the note endorsed values that were against human rights", "the Practice Note could not be seen as endorsing any such values" (letter 4 June 2014).

Factual Background

6. SBS is a not - for - profit organisation established in 1979 to meet the needs of Black (Asian and African-Caribbean) and minority ethnic women. SBS provides a range of advice and support services to enable Black and minority ethnic women to gain the knowledge and confidence they need to assert their human rights. This includes campaigning in relation to discriminatory practices that have an adverse impact on Black and minority women, including in relation to their financial and property rights.

7. Sometime during the course of late March/early April 2014, SBS discovered that the Law Society had issued a 'Practice Note' on 'Sharia Succession Rules'. The Press Release[1] published by the Law Society upon the issuing of the Practice Note describes its purpose as follows:

> 'The Law Society has published a practice note for solicitors to assist them in the use of Sharia law succession rules, in particular in will drafting, trust issues and disputes over estates. This is the first time guidance has been published for solicitors to assist them with the intricacies of Sharia succession rules, which is the code of law derived from the Quran and from the teachings and example of Mohammed.'

8. The Press Release states that: 'For solicitors tasked with drafting a Sharia-compliant will, there are three key steps that must be taken and which are significantly different to traditional probate processes. Firstly, the cost of the burial and any debts must be paid. Secondly, a third of the estate may be

[1] Available at http://www.lawsociety.org.uk/news/press-releases/law-society-publishes-practice-note-on-sharia-wills-and-inheritance-rules/.

given to charities or individuals who are not obligatory heirs. Finally, the remainder is given to a defined set of "primary" and then "residual" heirs.' The Press Release records that a significant feature of Sharia law 'is the inability to state in advance who the Sharia heirs will be, as the identity of the heirs and their respective entitlements can only be determined at the date of the testator's death'. The beneficiaries therefore are identified by reference to status (father, grandfather) and respective entitlement.

9. It appears that the Practice Note is intended to ensure that a solicitor is equipped with the knowledge necessary to advise (presumably a Muslim) client as to the requirements of a Sharia compliant will.

10. The Press release acknowledges that 'Sharia rules are not identical in every Muslim country; there are differences between Sunni and Shia rules, and different interpretations of Sunni law.' Indeed what Sharia law requires is highly contested.[2] Notwithstanding this, the Practice Note suggests it is an authoritative guide to the making of a Sharia compliant will. The legal risks of purporting to provide 'doctrinal' advice are addressed below. Further, the content of Sharia law in so far as it prioritises male rights to property as well as other forms of gender based laws are highly controversial because of their impact on women. Again, the legal risks of purporting to give advice as to this are addressed below.

11. The Law Society says that its Practice Notes 'are issued by the Law Society for the use and benefit of its members. They represent the Law Society's view of good practice in a particular area' (para 1.4, Practice Note).

12. The Practice Note advises that:

> 'This practice note is intended to assist solicitors who have been instructed to prepare a valid will, which follows Sharia succession rules.
> Solicitors who are dealing with clients where Sharia rules may be applicable should be aware of the following:

[2] See, for example, D Pearl and Werner Menski, 'Muslim Family Law' (1998, Sweet and Maxwell), Part 1; ed. Elisa Giunchi, 'Muslim Family Law in Western Courts' (2014, Routledge); *Hashwani v Jivraj* [2011] ICR 1004.

determining when Sharia rules may apply
the basics of Sharia succession rules
Sharia compliant will drafting
Sharia trust issues
disputes over Sharia estates

There are specific differences between Sunni and Shia rules on succession. These differences are not covered in this practice note (see paragraph 2.4 and paragraph 5 for further information).' (para 1.2)

13. Paragraph 2.4 addresses the need for an appropriate 'certificate of succession' and paragraph 5 provides details of other sources of advice including 'local Sharia scholars'.

14. Paragraph 3 of the Practice Note provides that:

> 'In order to prepare a Sharia compliant will, you need to understand how the estate is applied under Sharia succession rules.
> - First, the cost of the burial and any debts are paid.
> - Secondly, a third of the estate may be given to charities or individuals who are not obligatory heirs.
> - Finally, the remainder is given to a defined set of 'primary' and then 'residual' heirs.'

15. As to the 'remainder', the Practice Note advises as to the identity of the primary and residual heirs. It then advises that:

> 'The main difficulty with preparing a Sharia compliant will is the inability to state in advance who the Sharia heirs will be. As noted above, the identity of the heirs and their respective entitlements can only be determined at the date of death.
> Simply stating that the assets (or at least two thirds) are to pass 'according to the Sharia rules of succession' might be too uncertain for an English court to uphold, although this has not yet been tested.
> One option, frequently adopted in Canada and other common law countries, is to attach a detailed appendix to the will setting out potential Sharia inheritance scenarios. However, there is a risk of missing a crucial scenario and not covering all the potential outcomes.' (para 3.6)

16. As to the distribution of assets under Sharia law, it advises that:

> 'The <u>male heirs in most cases receive double the amount inherited by a female heir of the same class</u>. <u>Non-Muslims may not inherit at all, and only Muslim marriages are recognised</u>.

> Similarly, a divorced spouse is no longer a Sharia heir, as the entitlement depends on a valid Muslim marriage existing at the date of death.
> This means you should amend or delete some standard will clauses. For example, you should consider excluding the provisions of s33 of the Wills Act 1837 because these operate to pass a gift to the children of a deceased 'descendent'. Under Sharia rules, the children of a deceased heir have no entitlement, although they can benefit from the freely disposable third.
> Similarly, you should amend clauses which define the term 'children' or 'issue' to exclude those who are illegitimate or adopted.' (para 3.6)

17. As the Practice Note recognizes, Sharia law as it is understood by this Practice Note, discriminates as between women and men and Muslims and Non-Muslims and 'illegitimate'[3] and 'legitimate' children (by which it is presumed to mean born to parents who are not married) and between adopted children and those born to their parents. The Practice Note refers to the Solicitors Regulation Authority (SRA) Code of Conduct and specifically to those provisions addressing client care and equality and diversity. At Chapter 2 of the SRA Code it is provided that:

> 'This chapter is about encouraging equality of opportunity and respect for diversity, and preventing unlawful discrimination, in your relationship with your *clients* and others. The requirements apply in relation to age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation.
> Everyone needs to contribute to compliance with these requirements, for example by treating each other, and *clients*, fairly and with respect, by embedding such values in the workplace and by challenging inappropriate behaviour and processes. Your role in embedding these values will vary depending on your role.
> As a matter of general law you must comply with requirements set out in legislation - including the Equality Act 2010 - as well as the conduct duties contained in this chapter.'

18. It imposes a mandatory requirement that a solicitor 'provide services to *clients* in a way that respects diversity' (O(2.2)).

[3] The use of language here is unfortunate. 'Illegitimate' is an historically pejorative descriptor. Different language is now used in family law in preference; for example, s2, Children Act 1989 ('Where a child's father and mother were not married to each other at the time of his birth…') and see, amendments made by the Children Act 1989 to other laws to ensure the same effect ('in the definition of "child", for the words from "an illegitimate" to the end there shall be substituted "a child whose father and mother were not married to each other at the time of his birth"'; Sch 13, Children Act 1989).

19. There is no reference in the Practice Note to the discriminatory nature of Sharia succession rules, nor any reference to the Law Society's (or individual solicitors') duties under the Equality Act 2010.

20. SBS were understandably concerned to learn of the Practice Note. They are particularly concerned that the Practice Note promotes the acceptability of rules which are inherently discriminatory as against women (particularly Muslim women and/or women from minority communities), as well as others (including certain groups of children). It also purports by the detail it contains to provide (and advocate) a definitive account of at least one interpretation of Sharia law though the content of Sharia law is highly contested.

21. SBS have written to the Law Society and the SRA (the SRA having referred to the Practice Note in a footnote contained within its own guidance) concerning the Practice Note. The SRA has agreed to withdraw reference to the Practice Note 'given the concerns that have been raised in relation to the inclusion of the reference to the practice note.' The Law Society has resolutely refused to withdraw the Practice Note. It has asserted in correspondence that it took 'into account any equality and diversity implications for members of the profession' arising from the issuing of the Practice Note (letter dated 4 June 2014). Apparently, in this regard, 'what was being considered was whether the publication of a practice note would have equality or diversity implications in relation to solicitors in their roles as solicitors – for example in relation to their careers, practices or livelihoods' (letter dated 17 July 2014). They appear to have given no consideration to the impact of promulgating the Practice Note on, specifically, gender equality or indeed equality as between religious groupings (amongst Muslims) or as between classes of children. This is a very narrow understanding of 'equality and diversity' and apparently in conflict with the broader mandatory guidance issued by the SRA. Further, even within the parameters set by itself, the Law Society has failed to properly consider what impact attempting to comply with the guidance may have on individual solicitors having regard to their obligations under the Equality Act 2010.

Legal Background

(i) Preparation of Wills

22. The starting point is that, of course, subject to formalities and some immaterial exceptions, a testator is entitled to leave his estate to whom s/he chooses (Halsbury's Laws of England, Vol 102, para 33).

23. In preparing a will, a solicitor owes the usual duty of care in negligence and, importantly too, owes a duty to intended beneficiaries (in respect of whom they are deemed to have 'assumed responsibility'); *White and A'or v Jones* [1995] 2 AC 207. Further, in some circumstances a *professional* duty arises if a 'good service' is to be provided to a client (whether or not a duty in negligence also arises since the two 'may not necessarily be the same'), to advise them in a way which promotes the interest of the intended beneficiaries of a claim (and by extension a will) for otherwise they may be 'badly served' by the advice (*Reader v Molesworth Bright Clegg* [2007] EWCA Civ 169; [2007] 1 WLR 1082). (This is consistent with provision in the Equality Act 2010 prohibiting discrimination in respect of which a 'reference (however expressed) to providing or affording access to a benefit, facility or service includes a reference to facilitating access to the benefit, facility or service'; section 212(4)).

(ii) Public Sector Equality Duty ('PSED')

24. Section 149 of the Equality Act 2010 ('the 2010 Act') contains the PSED. Subsection (1) provides:

> 'A public authority must, in the exercise of its functions, have due regard to the need to—
>
> (a) eliminate discrimination, harassment, victimization and any other conduct that is prohibited by or under this Act;
>
> (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
>
> (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

25. Subsection (3) provides:

> ‘Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—
> (a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic…’

26. Subsection (5) provides:

> ‘Having due regard to the need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—
> (a) tackle prejudice, and
> (b) promote understanding.’

27. Subsection (7) defines the relevant protected characteristics as including race, religion and belief and sex. Section 10 of the 2010 Act defines ‘religion’ as meaning any religion, and ‘belief’ as meaning any religious or philosophical belief (including a lack of belief). Section 9(1) of the 2010 Act provides that ‘race’ includes colour, nationality, ethnic or national origins. ‘Sex’ is a reference to man or a woman (section 11, 2010 Act).

28. In *Bracking v. Secretary of State for Work and Pensions* [2013] EWCA Civ 1345; [2014] EqLR 61, McCombe LJ (with whom Elias and Kitchin LJJ agreed) summarised the case law on the PSED as follows (at para 26):

> ‘(1) ..[E]quality duties are an integral and important part of the mechanisms for ensuring the fulfilment of the aims of anti-discrimination legislation.
> (2) An important evidential element in the demonstration of the discharge of the duty is the recording of the steps taken by the decision maker in seeking to meet the statutory requirements..
> (3) The relevant duty is upon the … decision maker personally. What matters is what he or she took into account and what he or she knew. Thus, the …decision maker cannot be taken to know what his or her officials know or what may have been in the minds of officials in proffering their advice.
> (4) A [decision maker] must assess the risk and extent of any adverse impact and the ways in which such risk may be eliminated before the adoption of a proposed policy and not merely as a “rearguard action”.
> (5) These and other points were reviewed by Aikens LJ, …as follows:

(i) The public authority decision maker must be aware of the duty to have "due regard" to the relevant matters;
(ii) The duty must be fulfilled before and at the time when a particular policy is being considered;
(iii) The duty must be "exercised in substance, with rigour, and with an open mind". It is not a question of "ticking boxes"; while there is no duty to make express reference to the regard paid to the relevant duty, reference to it and to the relevant criteria reduces the scope for argument;
(iv) The duty is non-delegable; and
(v) Is a continuing one.
(vi) It is good practice for a decision maker to keep records demonstrating consideration of the duty.

(6) "[G]eneral regard to issues of equality is not the same as having specific regard, by way of conscious approach to the statutory criteria." …

(7) Officials reporting to or advising Ministers/other public authority decision makers, on matters material to the discharge of the duty, must not merely tell the Minister/decision maker what he/she wants to hear but they have to be "rigorous in both enquiring and reporting to them…"

(8) Finally, …it is…, helpful to recall passages from the judgment of my Lord, Elias LJ, in *R (Hurley & Moore) v Secretary of State for Business, Innovation and Skills* [2012] EWHC 201 (Admin) (Divisional Court) as follows:

> '89 It is also alleged that the PSED in this case involves a duty of inquiry. The submission is that the combination of the principles in *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 and the duty of due regard under the statute requires public authorities to be properly informed before taking a decision. If the relevant material is not available, there will be a duty to acquire it and this will frequently mean than some further consultation with appropriate groups is required…..:
>
> > '. . . the public authority concerned will, in our view, have to have due regard to the *need* to take steps to gather relevant information in order that it can properly take steps to take into account disabled persons' disabilities in the context of the particular function under consideration.'
>
> 90 I respectfully agree.....'

29. As stated above, the duty under the PSED is 'continuing' and so requires reassessment as new matters emerge (*R (Brown) v. Secretary of State for Work and Pensions* [2008] EWHC 3158, paras 90-96).

30. The duty is separate from the individual duties set out elsewhere in the 2010 Act. Thus a public authority must give "due regard" to the need to avoid unlawful discrimination, whether or not such discrimination actually occurs, see Elias J (as he then was) in *R (Elias) v. Secretary of State for Defence* [2005] EWHC 1435 (para 95). Similarly, the requirement to have due regard to (for example) the need to advance equality of opportunity is a qualitatively different obligation, and additional to, the need to avoid unlawful discrimination, see Dyson LJ in *R (Baker) v. Secretary of State for Communities and Local Government* [2008] EWCA Civ 141 (see, para 30).

(a) "Due" regard requires a sufficient and proper decision making process, *R (Equality and Human Rights Commission) v. Secretary of State for Justice* [2010] EWHC 147 (Admin) (at para 45). The "due" is important, requiring more than merely "some" regard, *R (Baker) v. Secretary of State for Communities and Local Government* [2008] EWCA Civ 141 (at para 141). An incomplete or erroneous appreciation of the duties will mean that "due regard" has not been given, see *Brown*, *R (Chavda) v. London Borough of Harrow* [2007] EWHC 3064 (at para 40).

(b) If a risk of an adverse impact is identified, consideration should be given to measures to avoid that impact, *R (Kaur) v. Ealing London Borough Council* [2008] EWHC 2062 (Admin); *R (Rahman) v. Birmingham City Council* [2011] EWHC 944 (at para 35). Information as to the extent of that adverse impact must be provided, and confronted by the decision maker, *R (JM and NT) v. Isle of Wight Council* [2011] EWHC 2911 (Admin) (at paras 122, 132, 138).

31. As can be seen, the duty applies to a public authority exercising a 'function' (section 149(1)). Those public authorities covered are not comprehensively listed in the 2010 Act. However, a 'public authority' for these purposes is a person who is specified in Schedule 19 (section 150(1)). Such a public authority may include both core and 'hybrid' authorities. By section 150(3) of the 2010 Act, 'a public authority specified in Schedule 19 is subject to the duty imposed

by section 149(1) in relation to the exercise of all its functions unless subsection (4) applies'. Section 150(4) provides that: 'a public authority specified in that Schedule in respect of certain specified functions is subject to that duty only in respect of the exercise of those functions'. Further, section 149(2) provides that the PSED applies to a 'person who is not a public authority but who exercises public functions . . . in the exercise of those functions'. A 'public function' for these purposes is 'a function that is a function of a public nature for the purposes of the Human Rights Act 1998 [HRA]' (section 150(5)). In this way the PSED applies to all bodies—'core' public authorities and 'hybrid' authorities—when exercising public functions (in the former case, that being all their functions), whether listed or not. Further, those may have specific duties imposed upon them (section 153). Section 153 gives the relevant Minister power to make regulations imposing specific equality duties on public authorities, but only those specified in Schedule 19, those being 'public authorities' in respect of all of their functions or certain specified functions.

32. Schedule 19 of the 2010 Act lists the Law Society 'in respect of its public functions'. As I will come to further below, though the 2010 Act plainly anticipates that the Law Society is subject to the PSED in respect of at least *some* of their functions, the Law Society's website contains virtually no reference to the PSED[4]; (there are four entries; (i) an overview in a Practice Note of the 2010 Act for solicitors; (ii) and (iii) referring to monitoring of its own employees and job applicants and (iv) a reference to a speech given by the new President, though I can find no reference to the PSED in the speech). There is no reference to *any* public function to which the PSED is said to apply (presumably because it is assumed that the PSED only applies to the regulatory functions now carried out by the SRA - an independent creature of the Law Society - though this is not clear). It is little surprise therefore that the Law Society denies, as it does, that the PSED applies to the promulgation of the Practice Note (see letter dated 4 June 2014) since it apparently does not accept (at least publicly) that it applies to any of its functions.

[4] http://www.lawsociety.org.uk/search/?q=public+sector+equality+duty.

33. As to what is meant by a public function, the courts will adopt a 'factor-based approach' (*YL v Birmingham City Council and Ors (Secretary of State for Constitutional Affairs intervening),* [2007] UKHL 27; [2008] 1 AC 95, para 91, per Lord Mance). This requires a court to have regard to all the features or factors which may cast light on the answer to the question whether a function is or is not a 'public function' and weigh them in the round. In applying this test, notwithstanding the restrictive approach taken in some cases, a broad or generous approach should be adopted (*Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2004] 1 AC 546, para 11, per Lord Nicholls; *YL,* para 4, Lord Bingham, and para 91, per Lord Mance). The expression 'public functions' covers activities carried out on behalf of the State and which are not similar in kind to services that could be performed by private persons. Lord Nichols in *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* gave as an 'obvious' example, 'the discharge of regulatory functions by organisations in the private sector, for instance, the Law Society' (para 9). Whilst many of the regulatory functions of the Law Society have been hived off to the SRA (pursuant to the Legal Services Act 2007), there is plainly a very close relationship – governed by statute – between them. The Law Society is itself regulated by statute (the Solicitors Act 1974).

34. The approach of the Law Society in denying that it is subject to the PSED in issuing the Practice Note (and indeed in making no real reference to the PSED at all in its published materials) is to be contrasted with that of the Bar Council (that is, in relation to those functions carried out otherwise than by the Bar Standards Board). The Bar Council assumes that it is subject to the duty in relation to (at least some of) its non-regulatory activities (see, Bar Council Public Sector Equality Objectives 2014 – 2015[5]) and these activities include the dissemination of good practice to Chambers (for example, as stated in their 'equality objectives', on the retention of women, an issue the Law Society deals with in its Practice Notes; see, for example 'Flexible Working' Practice Note).

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5 http://www.barcouncil.org.uk/media/292926/bar_council_public_sector_equality_objectives_and_action_plan_2014-15__2_.pdf.

35. As to the status of Practice Notes, the Law Society states that they 'represent the Law Society's view of good practice in a particular area. They are not intended to be the only standard of good practice that solicitors can follow. You are not required to follow them, but doing so will make it easier to account to oversight bodies for your actions.' This is guidance in the form of regulatory guidance and, given the context described above, in my view there are good prospects of establishing that the promulgation of the Practice Note was in the exercise of a 'public function' and thus the PSED applied and continues to apply to it.

(iii) The unlawful acts: section 29, Equality Act 2010

36. Section 29 outlaws discrimination in the provision of services. Discrimination, for these purposes, includes 'direct discrimination' as defined by section 13 of the 2010 Act. Direct discrimination occurs where a person treats another less favourably than he treats or would treat others "because of a protected characteristic", including race, religion or belief and sex.

37. Where the factual criterion applied as a basis for any less favourable treatment is inherently or obviously based on a protected characteristic, it will be discriminatory, otherwise it will be necessary "to explore the mental processes of the discriminator in order to discover what facts led him to discriminate", see *R (E) v. Governing Body of JFS and the Admissions Appeal Panel of JFS and Others* [2009] UKSC 15; [2010] 2 AC 728, per Lord Phillips at §21. When asking "why", however, it is important to distinguish between two types of "why" questions. One is "what caused the treatment in question and one is its motive or purpose". The former is important, the latter is not, see *JFS* (per Lord Phillips at para 21). The imposition of a condition which is inherently discriminatory will be direct discrimination, whatever the motive (*James v Eastleigh BC* [1990] 2 AC 751). For direct discrimination, it is not necessary that the ground for any treatment complained of is the actual characteristics of the service recipient but it may be by reason of the characteristics of a third party or indeed the incorrectly perceived characteristics of the recipient of services ('because of').

38. Further, for direct discrimination to be made out, it is not necessary for the protected characteristic to be the sole basis for any treatment, but only that the protected characteristic must have had a "significant influence on the outcome", see *Nagarajan v. London Regional Transport* [2000] 1 AC 501 (per Lord Nicholls at 513A-B).

(iv) The risk of illegality

39. Guidance which is in principle capable of being implemented lawfully but gives rise to an unacceptable risk of unlawful acts or decisions will itself be unlawful (*R v Suppiah v Secretary of State for the Home Department* [2011] EWHC 2 (Admin) para 137; *R (Refugee Legal Centre) v Secretary of State for the Home Department* [2004] EWCA Civ 1481; [2005] 1 WLR 2219). The significance of this is addressed further below.

(v) Human Rights

40. The Human Rights Act 1998 ('HRA') makes it unlawful for a public authority to act in a way which is incompatible with a Convention right (section 6, HRA). A public authority, for these purposes, includes a body exercising public functions in which case when exercising those public functions they too must act compatibly with the Convention rights (section 6(3), HRA). For reasons given above, in promulgating the Practice Note the Law Society was exercising a public function.

41. As to the Convention rights (Schedule 1, HRA), the relevant rights are Articles 8 and 14.

42. Article 8 provides that '(1) Everyone has the right to respect for his private and family life, his home and his correspondence. (2) There shall be no interference by a public authority with the exercise of this right except such as is in the interests of national security, public safety, or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the rights and protections of others'.

43. Article 8 then embraces family life (which would include those matters relevant

to this advice covered by Sharia law) and other aspects of intimate human life, ('private life'; *Pretty v UK* (Application no. 2346/02), paras 61 and 65).

44. As with some of the other Convention guarantees, Article 8 imposes certain positive obligations on the State: '[I]n order to determine whether such obligations exist, regard must be had to the fair balance that has to be struck between the general interest and the interests of the individual' (*Botta v Italy* (1998) 26 EHRR 241, 257, para 33). These may include on the facts of this case ensuring that Guidance issued is in conformity with the Convention rights and their underlying values.

45. Not all intrusions into the rights protected by Article 8 will violate Article 8. Interferences are permitted only where they are 'in accordance with the law'; and 'necessary in a democratic society' in the interests of one of the aims listed in Article 8(2) of the Convention. For an interference to be 'necessary in a democratic society' to achieve one of the enumerated aims listed in it, case law indicates that the following four elements must be satisfied: (a) that there is a pressing social need for some restriction; (b) that the restriction corresponds to (that is, that it has a rational connection with) that need; (c) that the restriction is a proportionate response to that need; (d) that the reasons advanced by the authorities are 'relevant and sufficient' (see, *Handyside v United Kingdom* (1976) 1 EHRR 737; *Barthold v Germany* (1985) 7 EHRR 383). This requires a substantive assessment by a court *R (Begum, by her litigation friend, Rahman) v Headteacher and Governors of Denbigh High School* [2006] UKHL 15; [2007] 1 AC 100; [2005] 1WLR 2950, para 30, per Lord Bingham.

46. Further, Article 14 contains the Convention's non-discrimination guarantee. It provides that:

> 'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.'

47. Article 14 protects against discrimination connected with 'birth or other status' and has been held to encompass intestacy laws which discriminate against 'illegitimate' children (*Marckx v Belgium* (1979) 2 EHRR 330; *Inze v Austria* (1987) 10 EHRR 394).

48. Article 14 complements the other Convention rights. It has effect solely in relation to 'the enjoyment of the rights and freedoms' safeguarded elsewhere in the Convention. However, in order for Article 14 to be engaged, a complainant need not show that there has been a breach of a substantive provision, merely that the facts of their case fall within the ambit of one of the substantive provisions (*Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557, [2004] 3 WLR 113, per Lady Hale, para 133). The Guidance here plainly falls within the 'ambit' of Article 8 because of its impact on family and private life.

49. Importantly, Article 14 covers practices and rules both formal and informal and is not merely concerned with formal distinctions in treatment but also practices that disadvantage one group or another (*D.H. and Others v. the Czech Republic* (2008) 47 EHRR 3, §§175-80; see, *Opuz v Turkey* (2010) 50 EHRR 695). Accordingly, '[w]here a general policy or measure has disproportionately prejudicial effects on a particular group, it is not excluded that this may be considered as discriminatory notwithstanding that it is not specifically aimed or directed at that group' (*Jordan v United Kingdom* (2003) 37 EHRR 2, at para 154).

50. As with Article 8, not all interferences with Article 14 will be unlawful since any interference may be justified. Where the discrimination is connected to gender, ethnicity, religion or birth status (that is 'legitimacy' or otherwise), however, strict justification is required since these classes are 'suspect classes.' Accordingly, any justification in respect of adverse impact on these grounds will be subject to particularly rigorous scrutiny and any discriminatory impact will require 'very weighty reasons' if it is to be justified (*Balkandali v United Kingdom* (1985) 7 EHRR 471, 501; *Ghaidan v Godin-Mendoza* [2004] UKHL 30; [2004] 2 AC 557, §19; *R (Carson) v Secretary of State for Work and Pensions* [2006] 1 AC 173, §§16-17, *per* Lord Hoffman and §§ 57-8, *per* Lord

Walker; *Timishev v Russia* (2007) 44 EHRR 37; *Hoffmann v Austria* (1993) 17 EHRR 293, 316, para 36; *Marckx v Belgium*).

51. In determining whether discrimination has occurred and/or justification is made out, regard will be had to international law (specifically the UK's international obligations), including the Convention on the Elimination of Discrimination Against Women ('CEDAW') (*Opuz)*. CEDAW provides, *inter alia*, that:

> 'States Parties shall take all appropriate measures:
> (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women' (Article 5, emphasis added)
> ……
>
> 1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations' (Article 16, emphasis added)

Advice

(i) PSED

52. There is nothing to suggest that the Law Society complied with the PSED in preparing and issuing the Practice Note. Quite the contrary; it appears that they did not so because they did not believe that they were required to do so and that position remains the same.

53. As referred to above, the Law Society considers that they are simply not subject to the duty in issuing the Practice Note (indeed it appears that they may think that they are not subject to the PSED at all given the absence of any meaningful mention of it on their website). For reasons given above, it is my view that there are good prospects of establishing that in deciding to issue the Practice Note and in issuing it, the Law Society were exercising a public function and accordingly the PSED applied.

54. The Practice Note plainly gives rise to equality issues since it provides guidance on how a solicitor might effect a will for a client seeking to rely on customary laws which discriminate against women (amongst others). Further, it promotes a

single view of Sharia law which will not be shared by all Muslims. Muslims are the dominant religious grouping in certain ethnic minority communities and in other ethnic minority communities, they are disproportionately represented. Accordingly, any disadvantage experienced by some Muslims (sharing a different perspective on Sharia law) may adversely impact on certain ethnic minority communities. The guidance in the Practice Note may give rise to discriminatory acts by solicitors (see below). None of this appears to have been considered because the Law Society has failed, and continues to fail, to recognize that it is subject to the PSED in relation to these matters. Indeed, the Law Society (regrettably) failed to recognize that the issuing of the Practice Note gave rise to any equality and diversity issue at all (and apparently still does not recognize this).

55. The failure to recognize these matters has resulted in the Law Society failing to meet the requirements of the PSED and in particular:

a. Failing to have any, and certainly not 'due', regard to matters specified in section 149, 2010 Act, specifically the need to remove or minimise disadvantages suffered by women (and Muslim women, in particular) that are connected to being a woman (instead the Practice Note endorses discriminatory attitudes towards women by encouraging solicitors to provide advice which reflects those attitudes).
b. Failing to have any, and certainly not 'due', regard to matters specified in section 149, 2010 Act, specifically the need to remove or minimise disadvantages suffered by those whose view of Sharia law does not reflect the apparently dominant view in the Practice Note (which solicitors are advised to use in the preparation of Sharia compliant wills).
c. Failing to have any, and certainly not 'due', regard to matters specified in section 149, 2010 Act, specifically the need to—
    i. tackle prejudice, and
    ii. promote understanding.
d. Failing to have any, and certainly not 'due' regard, to matters specified in section 149, 2010 Act, specifically the need to eliminate unlawful

discrimination.

e. Failing to collect evidence or, importantly, consult with any interested groups (including women's organisations working with minority women such as SBS).

56. Further, the Law Society failed, in issuing the Practice Note, to consider or introduce any mitigating measure such as clear confirmation that they do not endorse discriminatory practices and warning solicitors of the risks of discrimination associated with following the guidance in the Practice Note.

57. As mentioned above, and for the avoidance of doubt, it is understood that testators are entitled (subject to certain limitations that are not relevant here) to leave their property to whom they wish, and to 'discriminate' on grounds that are widely regarded as objectionable in so doing. However, in providing guidance as to how do so in a formal sense, without regard to the matters set out in the PSED, the Law Society is in breach of section 149 of the 2010 Act and that is actionable in judicial review proceedings.

58. As for challenging the Practice Note by way of judicial review proceedings, the ordinary time limit of three months (qualified by an additional requirement of 'promptness') has elapsed if the start date is taken as the issuing of the Practice Note. However, as mentioned above, the duty is a continuing one and so requires reassessment as new matters emerge (*R (Brown) v. Secretary of State for Work and Pensions* [2008] EWHC 3158, paras 90-96). Here the equality and diversity issues have been drawn explicitly to the attention of the Law Society. They ought, then, now to have complied with the PSED and if they have not, they should comply expeditiously. If they do not, proceedings may be issued by way of judicial review.

(ii) Section 29, Equality Act 2010

59. There is a real risk that solicitors relying on the Practice Note will (probably inadvertently) directly discriminate. This is because the Practice Note may lead to the stereotyping of Muslim clients with resultant expectations that they will

want a Sharia compliant will prepared and/or assume in cases where a Sharia compliant law is requested, that one must be prepared in accordance with the Practice Note and advise accordingly (notwithstanding that that does not conform to the construction afforded by the client's particular branch of Muslim belief). Similarly, assumptions may be made in consequence of the Practice Note as to the wishes of testators from certain ethnic groups (given the dominance of Muslims in certain ethnic groups). This would be likely to amount to direct religious and/or race discrimination.[6]

60. Further, arguably in preparing a will, a solicitor is providing an indirect 'service' to a potential beneficiary (see case law under 'preparation of wills' above). If discriminatory dispositions are chosen by a testator that is a matter for them alone. However, where a solicitor promotes or encourages this, which the Practice Note may invite, that may unlawfully discriminate against any disadvantaged potential (female) beneficiary 'because of' sex. As stated above, the basis for any discriminatory treatment need not be the protected characteristic (sex) of the service recipient (ie the testator) but here could include a third party such as a potential beneficiary. The same observations as apply in relation to sex apply equally to religion and race. The Practice Note is especially worrying since it does not caution solicitors against the risk of discrimination and, as mentioned, the guidance apparently enjoys the imprimatur of the Law Society though straying into the sphere of doctrinal advice.

61. Any unlawful discrimination by a solicitor in consequence of purporting to give effect to the Practice Note would be actionable as against the solicitor in the County Court (and compensation would be payable in the event of a successful claim).

(iii) The risk of illegality

62. For the reasons given above (as to its potential impact on the conduct of solicitors and the advice they give and the requirements of section 29 of the

[6] In the case of race discrimination, possibly indirect discrimination too in some cases: see section 19, 2010 Act.

2010 Act), the Practice Note gives rise to an obvious risk of illegality in its application and is accordingly unlawful (as a matter of ordinary public law) for that reason alone. This illegality would sound in judicial review proceedings.

(iv) Human Rights

63. As mentioned above, Articles 8 and 14 impose positive obligations on the State and in particular, those exercising public functions. The Law Society in promulgating the Practice Note is exercising a public function for the reasons given above and is bound, therefore, to comply with the Convention rights.

64. The Practice Note contains guidance which if followed results in the discriminatory disposal of property and it will do so in accordance with discriminatory customary/cultural norms which discriminate against women. This is precisely the form of discrimination that Article 14 (with Article 8) seeks to eradicate (especially when one has regard to international gender equality standards). The same observations can be made about religion, race and a person's status as born to parents who are not married.

65. No doubt the Law society would contend that the Practice Note was justified (under Articles 8(2) and/or 14) because it merely explains to solicitors how to prepare a Sharia compliant will. However, without considerable qualification (cautioning against discrimination), the Practice Note arguably promotes discrimination and entrenches customary rules which disadvantage women, in particular (that being the principal concern of SBS). The conclusion reached by the Law Society that though "express consideration was given as to whether the note endorsed values that were against human rights", "the Practice Note could not be seen as endorsing any such values" (letter 4 June 2014), is plainly wrong in the circumstances. This too would be challengeable in judicial review proceedings.

66. In conclusion, there are good grounds for a challenge in judicial review (by reason of the failure to comply with the PSED at least). Those instructing me should consider disclosing the contents of this advice to the Law Society in an effort to promote a negotiated settlement bearing in mind the very important

issues raised by this advice. In the first instance, the Law Society should be invited to adopt the same approach as the regulatory body, the SRA, and withdraw the Practice Note. Fresh guidance could then be considered following consultation and compliance with the PSED.

67. I hope this is of assistance to those instructing me and if I can be of any further assistance I hope they will not hesitate in contacting me.

KARON MONAGHAN QC

5 August 2014